IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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| AZMI ATTIA, MARK BARR, KEVIN CONROY, and all other individuals similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>EXXON MOBIL CORPORATION, SUZANNE McCARRON, MALCOLM FARRANT, BETH CASTEEL, DANIEL LYONS, and LEN FOX,<br><br>Defendants. | Case No. 4:16-cv-03484<br><br>Honorable Keith P. Ellison |

**DEFENDANTS' THIRD NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF THEIR MOTION TO DISMISS THE AMENDED CLASS ACTION COMPLAINT**

Defendants Exxon Mobil Corporation, Suzanne McCarron, Malcolm Farrant, Beth Casteel, Daniel Lyons, and Len Fox respectfully submit this third notice of supplemental authority in support of their motion to dismiss the Amended Class Action Complaint (ECF No. 37).

In two recent decisions, the United States Courts of Appeal for the Sixth and Ninth Circuits have affirmed the dismissal of stock-drop claims brought under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132, against the fiduciaries of an employee stock option plan on the ground that the complaints in those cases failed adequately to allege an alternative action that the fiduciaries could have taken as required by *Fifth Third Bancorp* v. *Dudenhoeffer*, 134 S. Ct. 2459 (2014). These decisions provide further support for Defendants' motion to dismiss. Copies of the opinions are attached.

***Graham (Eaton Corp.)***. On January 8, 2018, the United States Court of Appeals for the Sixth Circuit issued an opinion in *Graham* v. *Fearon*, No. 17-3407, 2018 WL 315098 (6th Cir. Jan. 8, 2018) (attached as Exhibit A) that affirmed the district court's earlier decision to dismiss with prejudice the plaintiffs' duty-of-prudence, stock-drop claims against the fiduciaries of an employee stock option plan. *See Graham* v. *Fearon*, No. 1:16-cv-2366, 2017 WL 1113358 (N.D. Ohio Mar. 24, 2017)). Defendants cited the district court's opinion in their opening and reply briefs in support of their motion to dismiss. (*See* ECF No. 37 at 13, 16 & ECF No. 39 at 3, 5.)

As in this case, the plaintiffs in *Graham* alleged that the defendants should have protected plan participants by: (1) disclosing the allegedly adverse information, (2) halting new contributions or investments in the company's stock, or (3) investing plan assets in a "low-cost hedging product to offset some of the losses." *Graham*, 2018 WL 315098, at *2.

In affirming the district court's opinion, the Sixth Circuit held that the complaint did not propose an alternative action so clearly beneficial that a prudent fiduciary could not conclude that it would be more likely to harm the fund than to help it. *Id.*, at *5. In particular, the court rejected the plaintiffs' arguments that an earlier disclosure of the allegedly adverse information or halting of trading would necessarily be better for plan participants, including their assertion that "'the longer a securities fraud goes on, the more harm it causes to shareholders.'" *Id.*, at *5-6 (quoting appellants' brief). The court next rejected the plaintiffs' argument that the continuing decline in the company's stock price in the months after the disclosure of adverse information showed that the company suffered a "'reputational penalty'" from concealing the information because the defendants' duty of prudence does not require prescience. *Id.*, at *6–7. The court further rejected the plaintiffs' hedging allegations, reasoning that plaintiffs failed to provide "specific factual allegations" regarding the vague "low-cost hedging product" to permit the court

to engage in the "careful, context-sensitive scrutiny of a complaint's allegations" as required by *Dudenhoeffer*. *Id.*, at *7.

The Sixth Circuit also rejected the plaintiffs' argument that "it would make little sense for the Supreme Court to reject a presumption of prudence in [*Dudenhoeffer*] only to impose a standard that virtually forecloses all similar actions in the future," an argument the plaintiffs here make. *Id.*, at *7. Recognizing that the standard was "difficult for plaintiffs to meet," the court reasoned that "under the particular facts of this case, none of Plaintiff's proposed alternatives was so clearly beneficial that a prudent fiduciary, under then prevailing circumstances, could not conclude that it would be more likely to harm the fund than to help it." *Id.*

Finally, the Sixth Circuit held that the district court properly exercised its discretion in denying the plaintiffs' perfunctory request for leave to amend. *Id.*, at *8. The court reasoned that the plaintiffs did not state additional facts that would cure any of the complaint's potential deficiencies and thus gave the district court no reason to believe that an amended complaint would be anything other than futile. *Id.*

***Laffen (Hewlett-Packard Co.)***. On January 9, 2018, the United States Court of Appeals for the Ninth Circuit issued an opinion in *Laffen* v. *Hewlett-Packard Co.*, No. 15-16360, 2018 WL 328117 (9th Cir. Jan. 9, 2018) (attached as Exhibit B) that affirmed the district court's earlier decision to dismiss with prejudice the plaintiffs' duty-of-prudence, stock-drop claims against the fiduciaries of an employee stock option plan.

The plaintiffs in *Laffen* faulted the defendants for investigating a whistleblower's allegations that a company acquired by the defendant company had engaged in questionable accounting practices before taking alternative action to protect plan participants. *Laffen*, 2018 WL 328117, at *2. As in this case, the plaintiffs alleged that the defendants should have

protected plan participants by: (1) disclosing the allegedly adverse information, or (2) halting new contributions or investments in the company's stock. *Id*.

In affirming the district court's opinion, the Ninth Circuit held that the complaint did not propose an alternative action so clearly beneficial that a prudent fiduciary could not conclude that it would be more likely to harm the fund than to help it. *Id*. In particular, the court reasoned that "a prudent fiduciary in the same circumstances as Defendants-Appellees could view Laffen's proposed alternative course of action as likely to cause more harm than good without first conducting a proper investigation." *Id*. In addition, the court held that the complaint failed to plausibly allege that the defendants concealed inside information from plan participants, reasoning that all information available and required to be disclosed was appropriately disclosed. *Id*., at *1-2.

Dated: January 18, 2018

Respectfully submitted,

*/s/ Daniel J. Kramer*

Daniel J. Kramer (*pro hac vice*)
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
Telephone: (212) 373-3000
Facsimile: (212) 757-3990
dkramer@paulweiss.com

*Attorney-in-Charge for Defendants*

Theodore V. Wells, Jr. (*pro hac vice*)
Daniel J. Toal (*pro hac vice*)
Gregory F. Laufer (*pro hac vice*)
Jonathan H. Hurwitz (*pro hac vice*)
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
Telephone: (212) 373-3000
Facsimile: (212) 757-3990
twells@paulweiss.com
dtoal@paulweiss.com
glaufer@paulweiss.com
jhurwitz@paulweiss.com

*Attorneys for Defendants*

OF COUNSEL:

Mark Trachtenberg
Texas State Bar No. 24008169
S.D. Tex. Bar No. 24584
HAYNES AND BOONE, LLP
1221 McKinney, Suite 2100
Houston, TX 77010-2007
Telephone: (713) 547-2000
Facsimile: (713) 547-2600
mark.trachtenberg@haynesboone.com

Nina Cortell
Texas State Bar No. 04844500
S.D. Tex. Bar No. 3084650
Daniel H. Gold
Texas State Bar No. 24053230
S.D. Tex. Bar No. 2707300
HAYNES AND BOONE, LLP
2323 Victory Avenue, Suite 700
Dallas, TX 75219
Telephone: (214) 651-5000
Facsimile: (214) 651-5940
nina.cortell@haynesboone.com
daniel.gold@haynesboone.com

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing Notice has been served by electronic CM/ECF filing, on this 18th day of January, 2018.

*/s/ Daniel J. Kramer*
Daniel J. Kramer